BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

DOSS AVIATION, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	)	Docket No. 68669 RE: Excise Tax Appeal FINAL DECISION

This matter came before the Board of Tax Appeals (Board) on the briefs and joint statement of facts submitted by the parties in March 2009. Leslie R. Pesterfield and Amber K. Quintal, Attorneys, represented Appellant, Doss Aviation (Doss). William G. Pardee, Tax Policy Specialist, represented Respondent, State of Washington Department of Revenue (Department).

The Board reviewed the evidence, and considered the arguments made on behalf of the parties. The Board now makes its decision as follows:

BACKGROUND

During the audit period, January 1, 2003, through June 30, 2006, Doss reported its revenue from two contracts with the United States Government under the Government Contracting Business & Occupation (B&O) tax classification (RCW 82.04.280(7)), which provides a tax rate of 0.484 percent of gross income. The Department determined that these activities are within the Service and Other Activities B&O tax classification (RCW 82.04.290). Doss conceded that the activities did not fall within the Government Contracting classification, and instead argued that the correct classification for these activities is retailing, as defined in RCW 84.04.050(2)(a). The Service and Other Activities tax rate is 1.50 percent; the retailing tax rate during the audit period was only 0.471 percent.

Doss appeals to this Board from the denial of its reconsideration petition wherein the Department's Appeals Division affirmed the assessment of B&O tax at the Service and Other

Activities rate. Doss asserts that the Department erroneously limits the retailing classification only to "installing, repairing, altering, imprinting or improving of tangible personal property of or for consumers." Doss contends that it is providing services to the personal property of persons and not providing services to persons. Doss says the Department erred in not concluding that the taxable activities at issue fall within the term "installing" in RCW 82.04.050(2)(a).

ISSUES

Slonim. For the purpose of determining the applicable tax rate to apply to Doss's revenues from fueling and de-fueling government military aircraft, do those business activities fall within the B&O "Service and Other Activities" classification (RCW 82.04.290(2)(a)), or within the definition of "sale at retail" in RCW 82.04.050?

Answer: The fueling and de-fueling activities fall squarely within the B&O "Service and Other Activities" classification and are not "sales at retail" in RCW 82.04.050.[1]

FACTS AND CONTENTIONS

The relevant facts are uncontested. Since 1976, Doss has been a participant in the U.S. Department of Defense Fuel Management Industry.[2] During the audit period, Doss had fuel management contracts to perform "alongside" aircraft refueling and de-fueling operations at

[1]The Department requests rejection of Doss's contentions that the activities qualified for Retailing classification because they may also constitute "altering" tangible personal property or "providing tangible personal property with an operator" (RCW 82.04.050(2)(a) or (4)(a)(ii), respectively). The Department says that the Board's Order Establishing Procedural Dates stated that the parties had narrowed the legal issue to whether the activities constitute "installation" under RCW 82.04.050(2)(a). The Department addressed these new issues in its Reply Brief. The new issues are not beyond the scope of the Board's order because the Board did not, and could not, order specific legal issues pursuant to a pre-hearing conference. Apparently, upon attempting to draft its opening brief explaining why fueling and de-fueling would be within the common and ordinary meaning of "installation," Doss's counsel decided to seek additional theories on which to pursue this appeal. The issue of "alteration," however, is not substantively new. It is one of the alternative activities listed in the RCW 82.04.050(2)(a) category of "sales at retail," along with "installing" and "improving" property and, thus, should have been analyzed by the Department to aid in determining the intended meaning of the two activities in that category that the Department was on notice to address from the time of the pre-hearing conference. Also, the Board assumes that the Department was already familiar with the statute pertaining to the provision of equipment with an operator. Finally, the lack of depth in its analysis of "installation" and "improving" indicate that it would not have provided any more insight had it known about either issue at the time of the pre-hearing conference. The Department was not prejudiced in having to respond to these two new theories.

[2] Fact Stipulation (Stipulation), ¶ 1.

seven sites.[3] Each site entails fuel storage, distribution, security and accountability for the fuel, as well as facility maintenance.[4] Doss owned the fuel trucks.[5]

The activities in question were carried out pursuant to two contracts, one for Doss to provide fueling and de-fueling services at Fort Lewis for the period October 1, 2003, through September 30, 2007, and one for Doss to provide the same services at the Whidbey Island Naval Air Station for the period July1, 2002, through June 30, 2007.[6] Doss did not own the fuel.[7]

Fueling and de-fueling aircraft is a potentially dangerous and hazardous activity that requires specialized training, equipment, and knowledge. Doss's personnel abide by technical and strict requirements imposed by the government. An Operating Procedures for Shore Activities manual establishes the minimum operating procedures for safe handling of aviation fuel during the fueling process. Doss's technicians receive specialized training and are certified by an onsite government official. The training related to fueling and defueling, safety precautions, fuel product characteristics, and the machinery and equipment associated with the fueling process is extensive and ongoing.[8]

Fueling and de-fueling is the process of putting fuel into an aircraft, and removing fuel from an aircraft.[9] Doss employees perform multiple sophisticated fuel tests on a routine basis, looking for contaminants. If contaminants are suspected, then the aircraft is de-fueled, fuel filters changed, and then refueled with new, clean fuel.[10] De-fueling may also be required in order to perform maintenance on the aircraft, rebalance the aircraft, or match the aircraft's load

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[3] Stipulation, ¶ 4.
[4] *Id.*
[5] *Id.*
[6] Stipulation, ¶¶ 9 and 10.
[7] Stipulation, ¶ 16.
[8] Stipulation, ¶¶ 17 and 18. See also Affidavit of Brian Yates in Support of Doss's Motion for Summary Judgment. (Yates Affidavit) ¶¶ 3 and 4. The Department requested that the Board "honor the procedures outlined in its two prior orders" and treat Doss's Motion for Summary Judgment and Brief as an opening brief, thereby disregarding the Yates affidavit. With the exception of the improper conclusion of law that fueling aircraft is the installation of fuel because it is "the fixing in position for use" of the fuel (¶ 5), and the irrelevant statement that de-fueling is the "de-installation of aircraft fuel" (¶ 6), the facts recited in the affidavit are found either in the Fact Stipulation or in the voluminous documents in the Joint Exhibits. In fact, the Department does not contend that these facts were previously unknown to it, but instead relies upon technical procedural defects to support its request. Doss's decision to file a Motion for Summary Judgment, apparently solely for the purpose of presenting the Yates affidavit, does not prejudice the Department. Except for the improper conclusion of law, it will not be disregarded.
[9] Stipulation, ¶ 30.
[10] Yates Affidavit, ¶ 7b.

to its cargo or bomb load.[11]

The parties agree that an aircraft and fuel are both tangible personal property. The parties agree that an unambiguous statute is not subject to judicial interpretation. Doss notes that (1) the court may not add language to a clear statute,[12] (2) undefined terms are given their ordinary meaning,[13] (3) words in a statute must be given their usual and ordinary meaning unless a contrary intent appears,[14] and (4) dictionary definitions may supply meaning for undefined terms.[15]

Doss also notes that a statute is ambiguous if it is susceptible to more than one reasonable interpretation,[16] and that RCW 82.04.050(2)(a) has presented "few, if any, interpretive problems" since its enactment in 1939.[17] Notwithstanding its position that unambiguous statutes must be given their ordinary, everyday meaning, Doss cites additional rules of statutory construction for ambiguous statutes.[18] On the other hand, the Department notes that a statute is not ambiguous simply because a term is not defined,[19] and there is no need to construe or interpret a statute when its language is plain.[20]

Doss's Contentions.

Expansion of the meaning of "sale at retail" and "retail sale" beyond the express terms in RCW 84.02.050. At the outset, Doss asserts that it renders "labor and services" in respect to "installing," "altering," or "improving" tangible personal property of or for consumers. Doss also notes that RCW 82.04.050(2) was specifically added in 1939 to expand the meaning of "sale

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[11] *Id*,. ¶ 7a, 7c., and 7d.
[12] *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). Doss Opening Brief at 3-4.
[13] *City of Bellevue v. Int'l Ass'n of FireFighters,, Local 1604*, 119 Wn.2d 373, 380, 831 P.2d 738 (1992). Doss Opening Brief at 4. The Department also cites *Group Health Cooperative of Puget Sound v. Dep't of Revenue*, 106 Wn.2d 391, 401, 722 P.2d 787 (1986). ("The words of a statute, unless otherwise defined, should be given their usual and ordinary, everyday meaning."). Department Opening Brief, at 10.
[14] *Strenge v. Clarke*, 89 Wn.2d 23, 28, 569 P.2d 60 (1977). Doss Opening Brief at 5.
[15] *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn.App. 275, 281-82, 966 P.2d 355 (1998). Doss Opening Brief at-4.
[16] *State v. Van Worden*, 106 Wn. App. 110, 116, 967 P.2d 14 (1997), cited in Doss Opening Brief at 4.
[17] Doss Opening Brief, at 4.
[18] Doss Opening Brief, at 4 and 5-6; Department Opening Brief, at 10.
[19] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 549 (1992). Department Opening Brief, at 10.

at retail" from the sale of tangible personal property to include labor and services.[21]

Doss then argues, however, that the question is not whether its fueling and de-fueling activities constitute "installing," but that the "broader and more germane question" is simply whether Doss's activities constitute a "sale at retail" or a "retail sale."[22] In other words, asserts Doss, by "unreasonably limiting its inquiry to whether Doss's activities constitute 'installing,' the Department lost sight of the key issue, i.e., whether Doss's activities constitutes a 'sale at retail' or 'retail sale' as defined in RCW 82.04.050(2)."[23] In support of this argument, Doss asserts that even the Department has interpreted RCW 82.04.050(2), with the six activities listed in subsection (2)(a) as being non-exclusive, in light of Rule 224 and ETA 3046.2009.[24]

Doss argues that Rule 224 (WAC 458-20-224) supports its interpretation in light of the list of activities that are not within the "services and other business activities" B&O classification, which list, Doss asserts, is not exhaustive.[25] Doss refers to the following excerpt from subsection (3):

> It does not include persons engaged in the business of cleaning, repairing, improving, **etc.**, the personal property of others, such as automobile, house, jewelry, radio, refrigerator and machinery repairmen, laundry or dry cleaners.
> (Emphasis by Doss)

Doss emphasizes the Department's use of the term "etc." because, in its view, the use of this term "illustrates that under the Department's interpretation of RCW 82.04.050(2)(a), the six enumerated activities are not an exhaustive list of all the activities that would constitute a 'sale at retail' or 'retail sale.'"[26]

Doss argues that ETA 3046.2009 supports classification of its activities as a "sale at retail" or "retail sale" because it advises that the Department consider those terms to apply to charges made to consumers for "the following nonexclusive list of roadside assistance activities: ". . . Changing a battery; Inflating . . . a tire, or installing a spare tire; **The replacement of fluids**

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[20] *Nalandabodhi Buddhist Church v. Dep't of* Revenue, 2006 WL 3355304, 13 (Wash.Bd.Tax.App.) 2006) (citing *Northwest Steel Rolling Mills, Inc. v. Dep't of Revenue*, 40 Wn. App. 237, 240, 940 P.2d 1374 (1985). Department Opening Brief at 10.
[21] Doss Opening Brief, at 4.
[22] *Id.* at 5.
[23] *Id.* at 5.
[24] *Id.*
[25] *Id.* at 7.
[26] *Id.*

such as engine coolant or oil . . ." (emphasis by Doss). Doss comments: "It is noteworthy that the terms "changing," "inflating" and "replacement" are not set forth in RCW 82.04.050(2)(a).[27] Doss then concludes that it is also noteworthy that its primary activity of fueling and de-fueling aircraft "fits squarely within one of the enumerated activities that the Department has identified in the ETA as constituting a retail sale—replacement of fluids."[28]

Doss also argues that Rule 173 supports the classification of the fueling and de-fueling activities as constituting a "sale at retail" or "retail sale" under RCW 82.04.050.[29] That rule (WAC 458-20-173) provides, in part, with respect to the B&O tax in general:

> **Retailing.** Persons installing, cleaning, decorating, beautifying, repairing or otherwise altering or improving tangible personal property of consumers or for consumers are taxable under the retailing classification upon the gross proceeds received from sales of tangible personal property and the rendition of services.

Application of RCW 82.04.050(2)(a). In the event that the above arguments do not apply, Doss offers grounds for finding that the fueling and de-fueling activities constitute installing, altering, or improving tangible personal property. With respect to "installing" Doss contends that it installs the fuel, and "de-installs" the fuel, which meets the following dictionary definitions of "install:" set in position for use, establish in a place or condition, fix in position for use, and place or fix in position ready for use.[30]

With respect to "altering" and "improving" Doss asserts that the personal property acted upon is the aircraft. Doss relies on the following dictionary definitions of "alter:" change in one or more respects, but not entirely; to make a thing different without changing it into something else; to vary; to modify; and "sometimes to change in any way." Doss emphasizes the last meaning and argues that the aircraft is altered by fueling and de-fueling because the addition of fuel enables it to fly farther, and the de-fueling activities changes the aircraft by removing fuel, making it lighter, and potentially improving performance by changing contaminated fuel for clean fuel.[31] Citing the dictionary definition of "improve" (to augment, enhance, or intensify in quantity or quality, to make or turn into something better by improving, and raise to a more

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[27] *Id.*
[28] *Id.* at 7-8.
[29] Doss Opening Brief, at 6.
[30] *Id.* at 8.

desirable or more excellent quality or condition, and make better), Doss asserts that the fueling and de-fueling "certainly" make the aircraft better because fueling enables it to fly, or to fly farther, and de-fueling enables contaminants to be removed from the aircraft, safe maintenance and repairs, safe storage of the aircraft, and improved performance due to better balancing and matching it to the payload.[32]

Application of RCW 82.04.050(4)(a)(ii). Doss also contends, in the alternative, that the fueling and de-fueling activities should be classified as a retail sale within the meaning of RCW 82.04.050(4)(a)(ii). RCW 82.04.050(4)(a) provides that the term "sale at retail" or "retail sale" shall also include:

> (i) The renting or leasing of tangible personal property to consumers; and
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> (ii) Providing tangible personal property along with an operator for a fixed or indeterminate period of time. A consideration of this is that the operator is necessary for the tangible personal property to perform as designed. For the purpose of this subsection (4)(a)(ii), an operator must do more than maintain, inspect, or set up the tangible personal property.

Doss contends that its activities fall within the additional definition of a "sale at retail" in RCW 82.04.050(4)(a)(ii) for "providing tangible personal property along with an operator." Doss argues that this statutory definition of a "sale at retail" applies because it provides "fueling and defueling vehicles together with highly trained staff to operate the fueling and defueling vehicles."[33] Doss notes that the Department interprets this statute as applying to persons who "provide equipment . . . and, in addition, operate the equipment or supply an employee to operate the same for a charge . . . ."[34]

Department's Contentions.

Refueling is not "installing." First, the Department argues that including fueling within the meaning of "installing" would result, in the case of the typical business not doing business with the federal government, in the improper extension of the sales tax to services not authorized

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[31] *Id.* at 10-11.
[32] *Id.* at 11.
[33] Doss Opening Brief, at 12.
[34] WAC 458-20-211(5)(b).

by statute.[35] The Department also argues that the fueling and de-fueling activities do not come within the ordinary meaning of the word "install," which the Department asserts has a dictionary definition of "to set up for use or service" or "to set up for use or service (e.g., "the electrician installed the new fixtures," "had gas installed").[36] The Department further argues that ETA 3046.2009 (formerly ETA 2020.08.129 during the audit period) applies only to roadside assistance activities performed by towing companies.

Fueling and de-fueling are not "improving." The Department supplies three definitions that pertains to "improving" and "improvements" in general (i.e., not the more specialized application in the case of real estate): (1) "to enhance in value or quality: make more profitable, excellent or desirable,[37] (2) "to use profitably or to good advantage; to raise to a better quality or condition; make better.;[38] and (3) a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, . . . and intended to enhance its value, beauty or utility or to adapt it for new or further purpose."[39] The Department argues that Doss has not improved the aircraft because it did not make "changes to the aircraft itself, which better its quality of condition, nor did the fueling enhance the aircraft's value or quality, or constitute a valuation addition to the aircraft, or consist of more than mere repairs or replacement."[40]

Fueling and de-fueling are not altering. The Department supplies a dictionary definition for altering: "to cause to become different in some particular characteristic (as measure,

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[35] Department Opening Brief, at 10. The Department also asserts that the sales tax may not be collected on sales to the federal government, but provides no citation to authority.

[36] *Id.* at 11. The Department notes that the only results of a Westlaw search for the terms "installing fuel" and "installing gasoline" was in the context of installing fuel pumps, fuel storage tanks, or other fuel-related apparatus or equipment. Consequently, the Department applied the second of the above definitions (i.e., to set up for use or service (the electrician installed the new fixtures, had gas installed), and concluded that in the ordinary and common meaning of "install" or "installing," a person does not install fuel in an aircraft or vehicle. Instead, the Department concluded that, in common and ordinary language, a person "fills" an aircraft or vehicle's fuel tank with fuel, or "pours" fuel into a tank, or "adds" fuel to the tank, but does not "install" fuel. In particular, the Department's Determination noted that the contracts with the military and the operating procedures manual refer to the "fueling of aircraft" and "filling of tanks," but do not reference the "installing of fuel into the aircrafts' tanks. In sum, concluded the Department, Doss is not setting up or fixing in position the fuel it adds to the aircraft because the fuel is not a fixture attached to the aircraft. Ex. J7-2 and 3.

[37] Department Opening Brief, at 12.

[38] *Id.* at 13.

[39] Black's Law Dictionary 682 (5th ed. 1979); Department Opening Brief, at 13.

[40] Department Opening Brief, at 13.

dimension, course, arrangement, or inclination) without changing into something else."[41] The Department also cites Black's Law Dictionary (8th ed. 2004) for the proposition that, to constitute an alteration, the change must be "substantial--not simply a trifling modification."[42] Accordingly, it argues that the fact that the refueling makes the aircraft heavier or enables it to fly farther does not cause the "measure, dimension, course arrangement, or inclination (i.e., the characteristic) of the aircraft to become different" and, even if it did, any such change is "simply a trifling modification, and insubstantial."[43]

The activities are services, not the provision of equipment. The Department contends that, notwithstanding the fact that the fueling activities involve trucks with operators, Doss's sole contractual responsibility is providing fueling services, not trucks, to the government.[44] The Department supports this contention with reference to (1) the contract specification that Doss "provide a highly qualified, experienced, and mission-oriented group of personnel who are drug free and can readily meet all contract objectives," and (2) the stipulation that the primary activity under the two contracts is the fueling of Government aircraft.[45] Noting that "strained, unlikely or unrealistic" statutory interpretations must be avoided,[46] the Department argues that Doss's logic leads to the conclusion that a laundry list of taxpayers operating equipment, while also providing services to consumers, would be deemed engaged in retail sales rather than "Service and Other Activities."[47] The Department contends that Rule 211(5)(b), cited by Doss, actually avoids this strained result by providing that the income from providing equipment with an operator will be classified for B&O tax purposes "according to the classification of the activities performed by

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[41] Department Reply Brief, at 5--6. This definition is the same one in an earlier edition of the same dictionary that was considered in *Cowiche Canyon Conservancy v. Bosely*,118 Wn.2d 801, 814, 828 P.2d 549 (1992), cited by the Department in its Reply Brief, at 5.
[42] Department Reply Brief, at 5.
[43] *Id.* at 6.
[44] *Id.* at 7 and 10.
[45] Exhibits J1-126 and J2-25, and Fact Stipulation, ¶ 13. Department Reply Brief, at 8. The Department also refers to the substantial percentage of each contract's revenues that are derived from fueling, as opposed to other activities in the contract, but that begs the question Doss poses of whether the operators performing the fueling are merely doing so in the course of the provision of equipment to the government.
[46] *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993). Department Reply Brief, at 8.
[47] The Department lists 51 examples, from accountants, agents, ambulances, and attorneys through kennel operators, loan agents, physicians, teachers, and veterinarians. The Department included many overlapping categories (music teacher and teacher, attorney and lawyer, architects and landscape architects, osteopathic physicians and physicians), and included janitors even though the alleged strained interpretation would not inadvertently create a problem because there is a specific provision in RCW 82.04.050(2)(a) that controls janitorial services.

the equipment and operator."[48]

Furthermore, noting that the activities are hazardous and require specialized training, equipment and knowledge, the Department contends that the activities are neither altering nor improving tangible personal property because the services involve a high degree of skill, knowledge, and experience, and any improvement or alteration of the aircraft is minor compared to the level of skill, knowledge, and experience provided pursuant to the contracts. The Department concludes that Doss was rendering professional services that are subject to B&O tax at the rate specified in RCW 82.04.290 for "Service and Other Activities."[49]

ANALYSIS AND CONCLUSIONS

Relevant statutes.

RCW 82.04.290(2)(a) provides:

> Upon every person engaging within this state in any business activity other than or in addition to an activity taxed explicitly under another section in this chapter or subsection (3) of this section; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of 1.5 percent.

RCW 82.04.090(2)(b) further provides:

> This subsection (2) includes, among others, and without limiting the scope hereof . . . , persons engaged in the business of rendering *any type of service which does not constitute a 'sale at retail'* . . . . (Emphasis added.)

RCW 82.04.050 sets forth three categories of services that are to be deemed "sales at retail" instead of "services." Within the category found in section (2), six different types of services are described. Doss contends that its activities are within RCW 82.04.050(2)(a):

> The term . . . shall include the sale of or charge made for . . . labor and services rendered in respect to . . . the installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property . . . .[50]

The other five other types of activities in the RCW 82.04.050(2) category are:

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[48] Department Reply Brief, at 9-10.
[49] Department Opening Brief, at 13-15.
[50] Doss also had a contract to wash the exterior of aircraft located at Fairchild Air Force Base. In the course of the audit, the Department reclassified the revenue from those activities to "Retailing" from "Service and Other" classification. Stipulation, ¶ 21. Because the contract was with the federal government, Doss was not required to collect and remit retail sales tax. *Id.*

(b) The constructing, repairing, *decorating*, or improving of new or existing buildings or other *structures under, upon, or above real property* of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, *and shall also include the sale of services or charges made for the clearing of land and the moving of earth* excepting the mere leveling of land used in commercial farming or agriculture;

(c) The constructing, repairing, or improving of any *structure upon, above, or under any real property* owned by an owner who conveys the property by title, possession, or any other means to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then reconveyed by title, possession, or any other means to the original owner;

(d) The cleaning, *fumigating, razing, or moving* of existing buildings or structures, *but shall not include the charge made for janitorial services*; and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, *furnace or septic tank cleaning*, snow *removal* or sandblasting;

(e) *Automobile towing and similar automotive transportation services*, but not in respect to those required to report and pay taxes under chapter 82.16 RCW;

(f) The furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar *license to use real property*, as distinguished from the renting or leasing of real property . . . .
(Emphasis added.)

RCW 82.04.050(2)(a).

The Board agrees with the Department's reasoning and conclusions, as set forth in its Determinations, that, in common and ordinary language, a person "fills" an aircraft or vehicle's fuel tank, or "pours" fuel into a tank, or "adds" fuel to the tank, but does not "install" fuel. In this regard, we emphasize the importance of the Department's observation that the contracts and military's operating procedures refer to "fueling of aircraft" and "filling of tanks" but do not reference the "installing of fuel into the aircrafts' tanks." In the plain context of installing something, one does not refer to setting transient things in a position for use. Instead, "fixed" things such as engine parts, including fuel tanks, are "installed."

Similarly, the Board concludes that, in common and ordinary language, one may fill a tank, pour fuel into a tank, or add fuel to a tank, or one may drain a tank, pump fuel out of a tank, etc., but that, based on the common and ordinary use of the word "alter," one would not consider the fuel tank of an aircraft to have been thereby altered simply by virtue of the fact that the fuel tank has more or less fuel inside it. It is also just as clear that filling, pouring, or adding fuel to an aircraft's fuel tank does not improve the aircraft in the common and ordinary understanding of making an improvement.

Interpreting RCW 82.04.050(2)(a). Overlooked by the parties is the important legal fact that RCW 82.04.050(2)(a) is merely an exception to the general rule in RCW 82.04.290(2)(a) that the 1.5 percent tax rate applies to "every person engaging . . . in any business activity *other than* or in addition to an activity explicitly under another section in this chapter . . . ." (Emphasis added.) RCW 82.04.050(2)(b) then expressly clarifies that the specific types of services in the various definitions of "sale at retail" are treated as retailing and not as a service activity: "This subsection (2) includes . . . persons engaged in the business of rendering any type of *service* which does not constitute a "sale at retail" or a "sale at wholesale." (Emphasis added.) Thus, our task is to determine precisely those kinds of service activities that the legislature intended to be included in "sale at retail."

The primary goal in statutory interpretation is to ascertain and give effect to the intent of the legislature.[51] In order to determine legislative intent, the court begins with the statute's plain language and ordinary meaning.[52] Under the "plain meaning" rule, examination of a statute in which the provision is found is the better approach, rather than examining only the statutory provision at issue.[53] Thus, in attempting to give effect to the plain meaning of words the legislature has used, each provision is viewed in relation to other provisions as the object is to determine a consistent construction of the whole statute.[54] In this case, if there is any doubt about the meaning of "installing," "altering," and "improving," then their meaning could be determined by reference to their relationship with the other three specific services related to tangible

[51] *King County v. Hearings Board*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000).
[52] *Id.*
[53] *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002) (recon.den.)
[54] *State v. Somerville*, 111 Wn.2d 524, 760 P.2d 932 (1988).

personal property listed in RCW 82.04.050(2)(a).[55] The three other services listed are "repairing," "cleaning," and "imprinting."

Reviewing the six service activities listed, the Board finds that the tangible characteristic common to all six is that they all apply to non-consumable, solid objects that are changed in various ways by various manipulations of the service provider. The Board concludes that the legislature intended the plain and everyday meaning; that retailing services apply to solid objects that may be installed, repaired, cleaned, altered, or improved; and that the legislature did not intend for "installing" to apply to a fluid consumable such as fuel. As applied to an aircraft, the ordinary language one would use for "altering" and "improving" would assume a change in the aircraft itself, not mere changes in the aircraft's contents, whether it be fuel, passengers, or cargo. Under Doss's strained concept of the ordinary and common meaning of "alter" and "improve," even the boarding or deplaning of the pilots would be included in those terms.

In general, the plain, obvious meaning of language of a statute is to be preferred to a curious or hidden sense.[56] This principle is particularly important in the interpretation of tax statutes because it promotes the certainty and stability in the tax system needed by businesses to plan their affairs. In fact, Doss originally reported these revenues under the Government Contracting B&O tax classification, RCW 82.04.280(7). If the common and ordinary meaning of "install," "alter," or "improve" included fueling and de-fueling, one would expect that Doss would have originally reported its revenues as such services. Although the Board does not apply a subjective intent test, Doss's own actions are evidence of the common and ordinary meaning of these terms by taxpayers. Doss's interpretations of all three terms it relies upon in this appeal are extraordinarily strained.

Moreover, the level of detail in RCW 82.04.050 in describing service activities that qualify for retailing, instead of the "catchall" Service and Other Business Activity classification in RCW 82.04.290, is so specific and detailed as to lead this Board to conclude that, if the legislature had intended that a service consisting solely of adding and removing fuel from aircraft, watercraft, automobiles, etc., the legislature would certainly have done so.[57] To begin

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[55] *Shurgard Mini-Storage of. Tumwater v. Dep't of Revenue*, 40 Wn. App. 721, 700 P.2d 1176 (1985).
[56] *Aiken v. Spalding*, 684 F.2d 632 (9th Cir. 1982), cert.den. 103 S.Ct. 1795, 460 U.S. 1093, 76 L.Ed.2d 361 (1983).
[57] The introduction to RCW 82.04.050(2) provides: "The term 'sale at retail' . . . shall include the . . . charge made for labor and services rendered in respect to the following . . . ."

with, the legislature provided seven categories of activities deemed a "sale at retail" (RCW 82.04.050(1)–(7)). RCW 82.04.050(2) has six types of services deemed to be "sales at retail" within the subsection (2) category of services, subsection (3) provides for eight additional types of services that are deemed "sales at retail," and telegraph services are categorized separately in subsection (5).

Just within RCW 82.04.050(2), the definitions in RCW 82.04.050(2)(b) through (f), quoted above, include several very specific terms for covered activities: "decorating," the "clearing of land and the moving of earth, excepting the mere leveling of land used in commercial farming or agriculture," "fumigating," "moving of existing buildings and structures," "janitorial services," "furnace or septic tank cleaning," and "snow removal." Based on the extensive categorization and detail used to define the specific activities intended to be included in the retailing classification, the Board finds that, had the legislature intended that filling the tank of an aircraft be classified as retailing, it would have conveyed that intent with plain and simple language similar to the words used in RCW 82.04.050(2)(b) through (f).[58]

Doss's reliance on former ETA 2020.08.129 is misplaced. At the outset, an ETA cannot conflict with a statute, and the Board is not bound by the Department's interpretation. In this case, because "sale" at retail is defined by statute, that definition is controlling, and not even a court may expand the definition.[59] Second, that particular ETA is specifically applicable to roadside assistance, pursuant to RCW 84.02.050(2)(e), not to the specified exception to the services classification in RCW 84.02.050(2)(a). Therefore, even if the "non-exclusive" listing of activities that may constitute roadsides assistance was intended by the Department to apply to the specific activities listed in RCW 82.04.050(s)(a), the Board would have to conclude that such an interpretation is erroneous because it would be clearly contrary to the statute. Furthermore, even

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[58] See, e.g., *U.S. v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir., 2000), cert. den., 121 S.Ct. 837, 531 U.S. 1102, 148 L.Ed.2d 718 (2001).

[59] *State v. Chester, supra.* See also, e.g., *North Pacific Coast Freight Bureau v. State*, 12 Wn.2d 563, 571, 122 P.2d 467 (1942); *Burlington Northern, Inc. v. Johnston*, 89 Wn.2d 321, 572 P.2d 1085 (1977) ("While such agency has some discretion in interpreting ambiguous statutes, it may not alter or amend an act, and its interpretation must be within the framework and policy of the statute."); and *Fraternal Order of Eagles Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655 (2002), cert. den. 123 S.Ct. 2221, 538 U.S. 1057, 155 L.Ed.2d 1107 (2003).

if the ETA was appropriate authority for the Board to consider, the doctrine of *ejusdem generis* precludes its applicability to fuel.[60] The ETA lists fluids that are very different from fuel.[61]

RCW 82.04.050(4)(a)(ii). The structure of this statute, i.e., "providing tangible personal property *along with* an operator," (emphasis added) clearly demonstrates that RCW 82.040.050(2)(a)(ii) only applies when the primary purpose of the contract is the provision of specialized equipment, such as a crane, and an operator is provided only as an adjunct to the equipment. Clearly the government contracted for the provision of Doss's highly skilled and professional services, not for fuel trucks, as is evident from just a few portions of the first few pages of the contracts; Doss is being paid to provide highly specialized services (Doss itself emphasizes the extraordinary skill and training required by the contracts), not the fueling vehicles:

1. The government's acceptance of Doss's bid: "Your offer . . . in response to Solicitation . . . for aircraft refueling *services* . . . is hereby accepted."[62]
2. The next page begins with "Services to be furnished" (e.g., Exhibit J1-2).
3. In the Price Proposal section, Doss writes only of "providing quality services to our customers" (e.g., Exhibit J1-77);
4. The Cost/Price Proposal Content subsection addresses labor, wages, costs of supplies and services ahead of costs related to vehicles (e.g., Exhibit J1-78); and
5. The Risk discussion emphasizes the employees and their relationship to customer service, not the provision of equipment: "By ensuring that our employees have a keen interest in their jobs and the highest respect for themselves and their customers, we can be confident that we can attain *our goal* on this effort – the *delivery of outstanding service* to our customers." (Emphasis added, e.g., Exhibit J1-79.)[63]

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[60] That is, when specific items are listed, only those of the same class should be included. *Adams v. King* County, 164 Wn.2d 640, 192 P.3d 891 (2008); *Wick Const. Co. v. State*, 65 Wn.2d 672, 399 P.2d 311 (1965).

[61] Moreover, if fuel should have been included in the roadside assistance activities, the Department would logically have explicitly included "providing fuel" rather than limiting fluid-related activities to the replacement of fluids such as engine coolant and oil. In fact, the ETA provision deals separately with the sale of gasoline. "Retail sales tax does not apply to the sale of gasoline if the motor vehicle is paid." ETA 2020.08.129. Although this provision only applies to the *sale* of gasoline (not the specialized services Appellants offer), the fact that the provision sets gasoline apart from engine coolant and oil is instructive of their differences.

[62] E.g., Exhibit J1-1. (Emphasis added.)

[63] That paragraph concludes: The challenge, therefore, is to ensure that our employees have meaningful, rewarding jobs and a professional environment in which they feel appreciated and adequately compensated and to do so at the lowest possible cost to the government, e.g., Exhibit J1-79.

DECISION

The Department's assessment against Doss Aviation of tax on revenues from the contracts with the federal government to provide fueling and de-fueling services at the Whidbey Island Naval Station and Fort Lewis during the audit period is sustained.

DATED this 4 day of June, 2009.

BOARD OF TAX APPEALS

TERRY SEBRING, Chair

KAY S. SLONIM, Vice Chair

Petition for Reconsideration of a Final Decision

Pursuant to WAC 456-10-755, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within 10 business days of the date of mailing of the Final Decision. You must also serve a copy on all other parties. The filing of a petition for reconsideration suspends the Final Decision until action by the Board. The Board may deny the petition, modify its decision, or reopen the hearing.